

**STATE OF NEW MEXICO  
NEW MEXICO WATER QUALITY CONTROL COMMISSION**

**In the Matter of:  
PROPOSED AMENDMENTS TO  
STANDARDS FOR INTERSTATE AND  
INTRASTATE WATERS,  
20.6.4 NMAC**

**No. WQCC 20-51 (R)**

**AMIGOS BRAVOS' MOTION TO STRIKE LANL'S PROPOSED AMENDMENTS TO  
DEFINITION OF "TOXIC POLLUTANT" AT 20.6.4.7.T(2) NMAC**

Pursuant to 20.1.6.207.C NMAC, Amigos Bravos moves to strike new proposals from Triad National Security, LLC, and the United States Department of Energy (collectively referred to as "Los Alamos National Laboratory" or "LANL") to amend the definition of "toxic pollutant" at 20.6.4.7.T(2) NMAC. As grounds for this motion, Amigos Bravos states:

1. For the first time in this proceeding, in its post-hearing brief filed September 24, 2021, LANL proposed certain amendments to the definition of "toxic pollutant" at 20.6.4.6.T(2) NMAC. *See* LANL's Proposed Final Amendments to 20.6.4 NMAC at 2-5 [Amigos Bravos ("AB") Ex. A].

2. LANL presented no evidence for its new proposals to include in the definition:

- The list of "persistent toxics listed in 20.6.4.900.J NMAC,"
- Two "PFAS compounds" with accompanying footnote 1 stating that PFAS compounds do not apply to waters with limited aquatic life use,
- The list of "toxic pollutants" in 20.6.2.7 NMAC and accompanying footnote 2, stating that the toxic pollutants in 20.6.2.7 NMAC apply only to domestic water supply use, with the exception of PFAS compounds.

*See* AB Ex. A [LANL's proposed amendment to 20.6.4.7.T(2) NMAC with highlighting to objectionable portions].<sup>1</sup>

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<sup>1</sup> In LANL's Second Notice of Errata to LANL's Closing Argument, filed December 10, 2021, LANL "corrected" footnote 2 referenced above from "Toxic pollutants listed in 20.6.2.7 NMAC

3. However, any amendment to 20.6.4 NMAC adopted by the Water Quality Control Commission (“Commission”) must be supported by “substantial evidence.” NMSA 1978, § 7-6-7.B(2).

4. Furthermore, while the other parties in the proceeding have a right to cross-examine LANL witnesses on the meaning and effect of its proposals, they had no opportunity to do so because LANL put on no witnesses in support of its new proposals. NMSA 1978, § 76-6-6.D (all interested persons have reasonable opportunity to examine witnesses at Commission rulemaking hearing).

5. Therefore, the new proposals in LANL’s late-filed amendment should not be considered by the Commission and should be struck.

6. Pursuant to 20.6.1.307.C NMAC, Amigos Bravos’ counsel contacted LANL counsel, who opposes this motion.

7. Pursuant to 20.6.1.307.C NMAC, a memorandum in support accompanies this motion.

Respectfully submitted,

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only apply to waters with a domestic water supply designated use, with the exception of the PFAS compounds listed above,” to “For purposes of 20.6.4 NMAC, toxic pollutants listed in 20.6.2.7 NMAC only apply to waters with a domestic water supply designated use, with the exception of the PFAS compounds listed above.”

## MEMORANDUM IN SUPPORT

### Background

The New Mexico Environment Department (“NMED”) filed its original Petition in this matter on August 18, 2020. In that Petition, NMED proposed amending the narrative standard for “toxic pollutant” at 20.6.4.13.F(1) NMAC to include “toxic pollutants listed in 20.6.2 NMAC” (and “contaminants of emerging concern”).<sup>2</sup> NMED Petition, Proposed Amendments to 20.6.4 NMAC at 17. Throughout this proceeding, NMED continued to propose to add “toxic pollutants at 20.6.2 NMAC” to the narrative standard for “toxic pollutants.” *See* NMED Amended Petition, Proposed Amendments to 20.6.4 NMAC at 17 (Mar. 12, 2021); NMED Notice of Intent to Present to Technical Testimony (“Direct NOI”), Proposed Amended Rule – 20.6.4 NMAC at 17 [NMED Ex. 9] (May 3, 2021); NMED Notice of Intent to Present Rebuttal Technical Testimony (“Rebuttal NOI”), Proposed Amended Rule – 20.6.4 NMAC at 17 [NMED Ex. 110] (July 22, 2021); NMED’s Closing Argument, Proposed Amended Rule – 20.6.4 NMAC at 17 [NMED Ex. 141] (Sept. 24, 2021).

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<sup>2</sup> NMED’s proposed amendment read in full:

**F. Toxic pollutants:**

(1) Except as provided in 20.6.4.16 NMAC, surface waters of the state shall be free of toxic pollutants, including but not limited to contaminants of emerging concern and those toxic pollutants listed in 20.6.2 NMAC, from other than natural causes in amounts, concentrations or combinations that affect the propagation of fish or that are toxic to humans, livestock or other animals, fish or other aquatic organisms, wildlife using aquatic environments for habitation or aquatic organisms for food, or that will or can reasonably be expected to bioaccumulate in tissues of fish, shellfish and other aquatic organisms to levels that will impair the health of aquatic organisms or wildlife or result in unacceptable tastes, odors or health risks to human consumers of aquatic organisms.

NMED Petition, Proposed Amendments to 20.6.4 NMAC at 17.

LANL, on the other hand, opposed NMED's proposal to add "toxic pollutants listed in 20.6.2 NMAC" in its Direct NOI, Rebuttal NOI, and at hearing. LANL Direct NOI, Ex. 1 at 11 (May 3, 2021); LANL Rebuttal NOI, Ex. 57 at 12 (June 22, 2021); 2 Tr. 502:21-503:4 [AB Ex. B]. LANL opposed NMED's proposal in its Direct NOI because the criteria for those pollutants "are not listed in 20.6.2 NMAC" and "[t]he lack of numerical criteria leads to regulatory uncertainty and also bypasses the normal processes for the WQCC's adoption of numeric criteria." LANL Ex. 5 at 7 [Dail Test]. LANL continued its objection in its Rebuttal NOI on the same grounds:

If monitoring to levels that can cause harm to aquatic life or humans through consumption of aquatic life is the goal, then scientifically supportable methods should be used to ascertain those levels or limits. Until such a development, LANL urges the WQCC to avoid adopting vague language that does not identify levels or potential harm. The WQCC should, instead, encourage NMED to carry out investigative work to determine numeric criteria or numerical translators as NMED did for Plant Nutrients, utilizing the public process for greater transparency and regulatory clarity.

LANL Ex. 61 at 6 [Dail Test.].

At hearing, LANL's witness, Bryan Dail, opposed NMED's proposal to add the 20.6.2 NMAC list of toxic pollutants to the narrative standard of "toxic pollutant" at 20.6.4.13.F(1) NMAC. He explained that some toxic pollutants in that list "probably lack EPA-promulgated guidance documents which determine numeric limits **that are to be use-specific to those uses that are covered in 20.6.4 NMAC.**" 2 Tr. 501:18-21 (emphasis added) [AB Ex. B]; *see also* Dail PowerPoint at 7 [AB Ex. C]. Mr. Dail concluded by stating:

And so LANL's recommendation is the WQCC should disprove adopting broad lists from groundwater rules until such a time that NMED is able to review the scientific merits of adoption of the general applicability to site-specific realities on the ground in New Mexico and decide which of the uses that are being affected have promulgated scientifically defensible criteria that affect either aquatic life or human health.

2 Tr. 502:21-503:4 [AB Ex. B]; *see also* Dail PowerPoint at 8 [AB Ex. C].

Later in the hearing, Mr. Dail “clarified” that LANL would not object to referencing the 20.6.2 NMAC toxic pollutant list:

... as long as it is clear what uses are being protected in referencing a list that was designed to protection consumption – human consumption and human health. There is a DWS [domestic water supply] use that is not associated with every water body covered by 20.6.4.100 – or actually 98 through 800 and – so particular water quality segments that deserve some sort of protection. So it needs to be clear where DWS-derived criteria would apply in surface waters of the state.

2 Tr. 505:23-506:7 [AB Ex. B]. However, Mr. Dail did **not** provide any testimony on which “human consumption and human health” uses in 20.6.4 NMAC allegedly apply to the 20.6.2.7 NMAC list. Human consumption and human health uses in 20.6.4 NMAC include domestic water supply, human health-organism only, and public water supply, *See* 20.6.4.7.D(5), -H(2), -P(6) NMAC.

While LANL had opposed NMED’s proposal to include the 20.6.2 NMAC list of toxic pollutants in the narrative standard for toxic pollutants at 20.6.4.13.F(1) NMAC, LANL had proposed an alternate definition for “toxic pollutant” at 20.6.4.7.T(2) NMAC. Throughout this proceeding – from its January 7, 2021 comments to NMED’s proposed amendments to 20.6.4 NMAC to its Direct NOI and Rebuttal NOI, and at hearing -- LANL proposed to severely limit the definition current definition of “toxic pollutant” to the following:

**T. Terms beginning with the letter “T”.**

...

(2) **"Toxic pollutant"** means those pollutants, or combination of pollutants, ~~including disease causing agents, that after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will cause death, shortened life spans, disease, adverse behavioral changes, reproductive or physiological impairment or physical deformations in such organisms or their offspring.~~ listed by the EPA Administrator under section 307(a) of the federal Clean Water Act, 33 U.S.C. § 1313(a) or in the list below.

LANL's Comments on NMED Draft, Attachment 1 at 4 (Jan. 7, 2021); LANL Ex. 1 at 3; LANL Ex. 57 at 4; 2 Tr. 534:11-22 (Judd. Test.); Judd PowerPoint at 2 [AB Ex. D].

The effect of LANL's proposal would be to restrict the definition of "toxic pollutants" under 20.6.4 NMAC to the list of 65 or so toxic pollutants promulgated by the U.S. Environmental Protection Agency ("EPA") at 40 CFR § 401.15 and any list promulgated by rule by the Commission in the future. EPA's list of toxic pollutants was last updated in 1981. *See* 40 CFR § 401.15. Even LANL's expert, Mr. Dail, acknowledged EPA's 40 year old list is outdated. 2 Tr. 519:21-520:7.

During the hearing, no LANL witness proposed any change to LANL's proposed definition for "toxic pollutant," limiting the toxic pollutants to EPA's 40 year old list and to pollutants established by the Commission by rule in the future.

However, after the hearing, on September 24, 2021, when LANL filed its Closing Argument, LANL proposed new amendments to the definition of "toxic pollutant." LANL's late-filed amendment, for the first time, would include in the definition at 20.6.4.7.T(2) NMAC:

- A list "persistent toxics" set forth in 20.6.4.900.J NMAC.
- Two PFAS compounds with a qualifying footnote 1 that states:

<sup>1</sup> Pollutants listed as PFAS compounds do not apply to waters with a limited aquatic life designated use.

- A list of "toxic of pollutants" set forth at 20.6.2.7 NMAC with a qualifying footnote 2 that states:

<sup>2</sup> Toxic pollutants listed in 20.6.2.7 NMAC only apply to waters with a domestic water supply designated use, with the exception of the PFAS compounds listed above.

*See* LANL's Proposed Final Amendments to 20.6.4 NMAC at 2-5 [AB Ex. A].

On December 10, 2021, LANL filed its Second Notice of Errata to LANL's Closing Argument in which it "corrected" footnote 2 qualifying the list of 20.6.2.7 NMAC "toxic pollutants" to state:

<sup>2</sup> For purposes of 20.6.4 NMAC, toxic pollutants listed in 20.6.2.7 NMAC only apply to waters with a domestic water supply designated use, with the exception of the PFAS compounds listed above.

In its Proposed Statement of Reasons, LANL justified its new proposals with the following allegations:

74. At hearing, Dr. Dail clarified that LANL does not oppose individually identifying each toxicant from the list of toxic pollutants in the ground water regulations, 20.6.2.7 NMAC, so long as it is clear that applicability is limited to human health-related designated uses. Hrg. Tr., Vol. II, 505:19-506:1 (Dail).

84. Based on evidence and testimony presented at hearing regarding accumulated toxicological data for PFAS compounds defined as toxic pollutants in 20.6.2 NMAC and potential affects beyond drinking water, in its post-hearing submissions LANL proposed additional modifications to its proposed definition of "Toxic Pollutant" to add two PFAS compounds for which EPA has signaled intent to develop human health and aquatic life criteria and are defined as toxic pollutants in 20.6.2 NMAC, to the list of toxic pollutants subject to a limitation that "pollutants listed as PFAS compounds do not apply to waters with a limited aquatic life designated use."

85. Based on Dr. Dail's testimony regarding the toxic pollutants listed in 20.6.2 NMAC, LANL also proposes to add the list of toxic pollutants in 20.6.2.7 NMAC to the list of toxic pollutants, subject to a limitation that "Toxic pollutants listed in 20.6.2.7 NMAC only apply to waters with a domestic water supply designated use." This latter list includes one additional PFAS compound, LANL therefore proposes the following revised definition of "Toxic Pollutant" to incorporate these post hearing modifications:

LANL Stmt. of Reasons, ¶¶ 74, 84, 85 [AB Ex. D]. The only testimony cited in support of LANL's new amendments is Mr. Dail's at 2 Tr. 505:19-506:1, which is attached in AB Ex. B.

**None** of Mr. Dail's testimony during hearing supports including the list of persistent toxics in the definition of "toxic pollutant." **None** supports including the two PFAS compounds and prohibiting their application to limited aquatic life use. **None** supports adding the list of

20.6.2.7 NMAC toxic pollutants and limiting their use to “domestic water supply” and excepting out the two PFAS compounds. *See* Dail Hrg. Test. [AB Ex. B].

### **Argument**

#### **I. LANL’S LATE-FILED PROPOSALS TO AMEND 20.4.6.7.T(2) NMAC SHOULD BE STRUCK**

##### **A. LANL Presented No Evidence in Support of Its Late-Filed Proposals**

Any amendment to 20.6.4 NMAC adopted by the Commission must be supported by “substantial evidence.” NMSA 1978, § 7-6-7.B(2). In this case, LANL presented **no evidence** in support of its newly proposed amendment. Therefore, the Commission should not consider the late-filed proposal, which should be struck.

There can be no dispute that LANL presented no testimony in support of adding the persistent toxics list in the definition of “toxic pollutants.” LANL cites to no such testimony, and no such testimony exists.<sup>3</sup>

There also can be no dispute that LANL presented no testimony in support of adding the two PFAS compounds with the qualification that they do not apply to waters with a limited aquatic life use.

While LANL did qualify its objection to adding the 20.6.2.7 NMAC list of toxic pollutants to the narrative standard at 20.6.4.13.F(1) NMAC, Mr. Dail’s testimony does not support its proposed amendment to add the 20.6.2.7 NMAC list of toxics to the toxic pollutant definition at 20.6.4.7.T(2)NMAC. The entirety of that exchange with Mr. Dail reads:

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<sup>3</sup> It should be noted that LANL strays from the regulatory language in its list of persistent toxics, found at 20.6.4.900.J(1) NMAC, which lists “4,4’-DDT and derivatives” as persistent toxics. LANL takes the liberty of listing instead “4,4’-DDT (CAS number 50293), 4,4’-DDE (CAS number 72559), 4,4’-DDD (CAS number 72548).” LANL put on no evidence to support of the accuracy of its list of 4,4’-DDT and derivatives.



Q: With respect to the reference to toxic pollutant listed under the groundwater regulations, do you have any further comment about the propriety of including those as toxic pollutants for surface waters?

A. LANL has no objection as long as it is clear what uses are being protected in referencing a list that was designed to protect consumption -- human consumption and human health. There is a DWS [domestic water supply] use that is not associated with every water body covered by 20.6.4.100 -- or actually 98 through 800 and -- so particular water quality segments that deserve some sort of protection. So it needs to be clear where DWS-derived criteria would apply in the surface waters of the state.

2 Tr. 505:19-506:7 [AB Ex. C].

In that brief testimony, Mr. Dail does not testify that the definition of “toxic pollutant” at 20.6.4.7.T(2) NMAC should include the full list of 20.6.2.7 NMAC toxic pollutants. His testimony refers only “to the **reference** to toxic pollutant listed under the groundwater regulations” that NMED proposed for inclusion at 20.6.4.13.F(1) NMAC. 2 Tr. 505:19-20 (emphasis added). This distinction between NMED’s reference to the list and actually listing all toxic pollutants is critical. NMED’s proposal to include “toxic pollutants at 20.6.2 NMAC” would include any pollutants added by the Commission to that list in the future while LANL’s list would not include any such pollutants.

Further, Mr. Dail testified on numerous occasions in writing and orally that the pollutants in 20.6.2.7 NMAC could **not** be added to the list of “toxic pollutants” in 20.6.4 NMAC absent further investigation by NMED as to their application to **specific uses** in 20.6.4 NMAC since those uses were not set forth in 20.6.2 NMAC. *See, e.g.*, LANL Ex. 5 at 7; LANL Ex. 61 at 6; 2 Tr. 502:21-503:4, 501:18-21 [AB Ex. B]; Dail PowerPoint at 7, 8 [AB Ex. C]. In his brief qualification, Mr. Dail did **not** testify that all pollutants from the 20.6.2.7 NMAC list applied only to domestic water supply. Indeed, Mr. Dail testified that the uses applied to “human consumption and human health,” which would also include public water supply and human health-organism only uses. And LANL most certainly did not provide any evidence to support

footnote 2 excepting the PFAS compounds from applying to waters with a domestic water supply use. In short, LANL did not provide evidence that supports its inclusion of the list of 20.6.2.7 NMAC toxic pollutants and its limiting footnote.

Moreover, it should be noted that LANL's list of "toxic pollutants" from 20.6.2.7 NMAC leaves out at least four pollutants: acrylonitrile (CAS 107-13-1) at 20.6.2.7.T(2)(b) NMAC; cis-1,2-dichloroethene (cis-1,2-DCE) (CAS 156-59-2) at 20.6.2.7.T(2)(k)(iii) NMAC; DDT (CAS 50-29-3) at 20.6.2.7.T(2)(t)(iv) NMAC; and hexachlorocyclopentadiene (CAS 77-47-4) at 20.6.2.7.T(2)(t)(x) NMAC. It is not clear whether this omission is intentional or accidental. In either case, this omission underscores that its late-filed amendment is not properly before the Commission and should be struck.

**B. LANL's Late-filed Amendment Prevents Other Parties from Cross-Examining LANL Witnesses**

None of LANL's newly proposed language was put forth by LANL before or during the hearing, none was supported by testimony from a witness, and none was subject to cross-examination by the other parties. LANL's incomplete lists, its limitations on the PFAS compounds, its limitations on the list of 20.6.2.7 NMAC toxic pollutants, and the conflicting testimony of Mr. Dail all raise many questions that should have been subject to cross-examination.

Under the state Water Quality Act, all witnesses are subject to cross examination during Commission rulemakings. NMSA 1978, § 76-6-6.D. The other parties had no opportunity to cross-examine any LANL witness on the meaning or effect of its late-filed proposals, and the proposals should be struck on this ground as well.

## Conclusion

For the foregoing reasons, Amigos Bravos respectfully requests that LANL's proposals to amend the definition of "toxic pollutant" at 20.6.4.7.T(2) NMAC, filed September 24, 2021, be struck.<sup>4</sup>

Respectfully submitted,

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## Certificate of Service

I certify that a copy of the foregoing was emailed to the following on December 15, 2021:

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<sup>4</sup> While Amigos Bravos strongly opposes LANL's original proposal to amend the definition, Amigos Bravos does not move to strike that proposal, which is supported by evidence in the record.

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